

# **PROSECUTING THE DRUG IMPAIRED DRIVER**

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Law Enforcement Administrative Facility (LEAF)



## **COMMON CHALLENGES IN DRE CASES**

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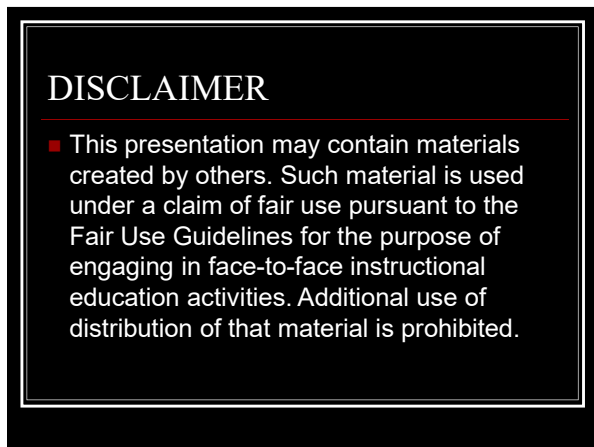
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## A DRE Trial



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## DRE Golden Rule -Be Prepared!!

- On every DRE case you need to anticipate the challenges and communicate.
- Officers-read the case reports before any interview and KNOW YOUR STUDIES!
- Rely on your matrix.
- Use a PDR to research prescription drugs
- Medication is for diseases-who cares

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## Be Prepared

- Prosecutors – Meet with your DRE's early on and be the defense attorney with them.
- Know what your lab will be willing to testify about.
- Study the case reports versus the matrix for inconsistencies in the case and be ready to address them early on.
- Focus on decision to drive while impaired

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## Prosecutors -Think it through

- Does the defense play really affect reliability or impairment?
- Is it only a diversion? Should you object?
- Can defense arguments work against each other?
- Always focus on the impairment.

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## Prosecutors-Don't let the defense control the focus

- Defense often tries to focus on noise
  - Reason for impairment
  - Attacks on the program or observations
- Focus on the decision to drive while impaired
- Focus on the impairment

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## REMINDERS

- Defense attorney may not cross – examine in chronological order
  - Keeps you and the officer off balance
  - Prepare new officers for this
- Never assume the play/question has merit
- Don't accept their language

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## Attack # 1 – Not a Doctor, just a cop

- This is what they want the jury to think.



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## Response # 1 to Cop is not a Doctor

### ■ RESPONSES

- Focus on the extensive DRE Training
- Studies- Used John Hopkins to determine ways to detect these drug classes
- Focus on this DRE's Experience
- Point out that toxicology confirmed the officers determination

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## # 2 -Real experts know how and why drugs cause certain effects

- A DRE cannot be a real expert if they cannot explain how a particular drug works in the body.

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## #2 - Response

- Even doctors that prescribe medications often cannot describe exactly how various drugs work. That is why they use PDR's.

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## #3 – Officer rushes to judgment

- The DRE has pre-conceived idea the suspect was under the influence and only looked for evidence to support this view.
- Variation- The DRE opinion was only based on the admission of drug use, the pill bottle, paraphernalia, etc.
- Basically, the DRE is biased

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## # 3 -Response

- A DRE is a standardized, in-depth investigation that utilizes a twelve step program to eliminate other causes. It includes an in- depth investigation that asks numerous questions about health and medications. -There is usually a lot of objective evidence!

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### #3-Response (cont.)

- Look at all the factors against this:
  - Impaired driving
  - Odor/physical signs
  - Drugs/paraphernalia found on the scene
  - Chemical testing confirms drug use
  - Any admissions

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### #4- Inconsistent observations

- Civilians/first responders/stop officer/and DRE all observed different things!

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### # 4- Response

- Not uncommon in a DUI drug case- symptoms change over time
- May be due to poly-drug use
- Stress consistency with the type of drug(s)

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### # 5 Observations do not fit in matrix

- Some of the observations the DRE officer made during the 12 step evaluation are inconsistent with what is expected in the drug category.

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### # 5- response

- This happens!
- May be due to poly-drug use or the 'down' side
- Stress more consistencies and impairment
  - Was the officer call correct? If so-emphasize
- Work together and explain the inconsistencies

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### # 6 - DRE Does not know defendants normal vital signs

- Attack- DRE does not know the defendants normal pulse, normal blood pressure, eye dilation, etc. so this measurement is useless.

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### # 6 - Response

- The entire medical community relies on normal ranges! (Thanks, DRE's are the same as doctors).
- Defendant showed impairment
- The variations noted were only one of many factors in the totality of the circumstances (re-emphasize the steps)

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### # 7- Attack -Drug Categorization

- The seven categories have no basis in science and are made up by the DRE's.
- Variation- Law Enforcement must identify a specific drug, not a broad category.

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### # 7 Response

- The categories were created based on observable and documented signs and symptoms
- Distinguishing between drugs in a category is impossible because many drugs have the same signs and symptoms
- How do you distinguish a drunk between wine, beer and hard alcohol?

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### Response (cont.)

- DRE protocol has been studied and proven scientifically valid.
- Drugs are commonly characterized by medical fields.

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### # 8 - No Miranda warnings before DRE

- The DRE has to be thrown out because no officer read Miranda before it was performed and they were not free to leave.



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### # 8 - Miranda does not apply

- Miranda is one step in a multi-step DRE protocol.
- Like SFST's, Miranda is not necessary for most of the protocol! The rest is non-testimonial performance.
- L.E. should always consult with other officers to make sure this is done. Do not need to re-read once done.

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### # 9- Daubert/Frye challenge

- Defense will argue the DRE protocol does not meet either Daubert/Frye or Rule 702.

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### # 9 Response

- All appellate courts have upheld the DRE protocols. See State v. Daly, 278 Neb. 903 (Neb. 2009) for a list of opinions.
- Again, Rule 702 (scientific evidence) does not apply to the majority of the protocol- just like the SFST's. See State v. Superior Court (Blake) 149 Ariz. 269 (1986)

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### # 10 -Missing Symptoms

- The DRE report shows this person did not exhibit all the necessary symptoms

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## # 10 - Response

- Totality of the circumstances
- Not having every symptom is not uncommon.
- Not everyone has exactly the same reaction.
- Effects can differ by tolerance, poly-drug use, type of alcohol and context
- Look to the test results to confirm!

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## Marijuana Challenges



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## Marijuana challenges



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## # 11 - SFST's show my client isn't impaired

- My client did well on parts of the FST's (one legged stand, etc.)

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NHTSA Studies



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## # 11- Responses

- Marijuana impairment often looks different than alcohol impairment
- Impaired perception of time and distance, paranoia, poor lateral driving movement
- Make sure your DRE knows studies- The Arizona Study, 1994- M. Burns, S. Calif. Research Institute, Table 7, p. 41 – DRE is 90% correct in identification for marijuana!
- Again, focus on the impairment !

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## FST's Not Valid for Marijuana

- FST's were only developed to detect alcohol, not drugs. The studies show this! (Can't resist, so alcohol isn't a drug?)

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## # 12 – FST's not valid for Marijuana

- Wrong. The FST's were studied as a part of the DRE program. The entire program, including SFST's as part of the multi-step process, was validated for determining seven categories, including marijuana.

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## If you need more help- NHTSA Studies- Cannabis

- *Drug Recognition Expert (DRE) Examination Characteristics of Cannabis Impairment* Rebecca L Hartman, et al (July 2016)
  - Results-Finger to nose with over three misses best indicator. Eyelid tremors better than an 86.1% predictor. Recommended overall FTN over 3 misses, eyelid tremors, OLS sway, 2 WAT cues. If 2 or more out of these 4, impaired.

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### # 13- Marijuana stays in your system!

- How about the defense argument that marijuana stays in your system so what the DRE is finding is "old" non-impairing stuff.?

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### NHTSA Studies- Marijuana

- Then why did the DRE get impairment?
- If necessary, use the study *Extended Urinary Delta-9-Tetrahydrocannabinol Excretion in Chronic Cannabis Users Precludes use as a biomarker of new Drug Exposure study* Ross H. Lowe, et al, (July 2009).

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### #14- Legal Medication Interference

- The defendant was prescribed to take this medication by a doctor and it does not cause unsafe driving.

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### # 14 -Response

- First, how are they going to get this in unless the doctor testifies?
- Ask to see the prescription warning labels or look up the medicine in the PDR.
- Make sure to investigate the prescribed dosage vs. the amount taken.

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### # 15- All the various alternative explanations!

- Fatigue caused the problem
- You didn't do the process right so you have to throw everything out
- Your HGN was wrong
- Mental illness or medical condition

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### #15-Response

- Doesn't challenge any of the observations, just the cause. The 12 step process is meant to eliminate other explanations. The factors may explain a few but not all the signs observed. Mental illness- focus on impairment and toxicology result. Medical condition-In DRE-clinical signs very helpful- compare to current appearance and evaluate types of drugs in system

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## #15 – HGN Robustness

- *Nystagmus testing in intoxicated individuals-* Dr. Karl Citek, et al, November 2003.
- Citek is an ophthalmologist and expert on HGN. He studied HGN and VGN at different positions (sit, stand, lie down). He confirmed the validity of the HGN if the person is standing, and found that if the person is sitting, there is only more danger of a false negative (helps the defendant). Fatigue won't cause HGN or impact protocol

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## NHTSA Studies- drugs

- The last NHTSA study to be aware of is the NHTSA *National Roadside Survey 2013-14*
- *5<sup>th</sup> survey since 1973. Clearly shows the number of drivers testing positive for alcohol was lowest since testing started in 1973*
- *Bad, Number of those weekend nighttime drivers with marijuana increased almost 50% since 2007.*

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## Know and use the studies

- John Hopkins
- 1986 LA DRE Field Evaluation (LAPD 173 study)
- 1994 Arizona DRE Validations study

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## Resources and help are available

- One of the best!

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## THANK YOU!



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